

Re: A Sales and Use Tax Nexus Guideline: Task Force IV

Date: July 15, 1997 Minutes

1. Determination of Nexus – Property Interests

a. Security interest

Starting from the earlier consensus that security interests other than a seller held purchase money mortgage did not establish physical presence, Task Force IV examined the feasibility of treating seller held purchase money mortgages (real estate mortgages and secured property interests) as creating nexus. Most participants agreed that corporate filing for authority to do business as a foreign corporation alone is inadequate in creating nexus. In contrast, the participants did not agree as to whether a security property filing itself would be sufficient to create, or would be required before a seller holding a security interest could create, nexus. One commentator indicated that the security interest example was misplaced. It properly belongs under II.B.3.b. The participants agreed to discuss this security interest nexus issue at the Whitefish meeting.

b. Lease related interest

The consensus on July 8 was that nexus applies to leasing only if the lease is an operational lease. (A lease that is properly classified as a financing document is treated under the security interest rules.) The participants on July 15 discussed the meaning of an “operational lease,” whether this term should be defined for tax purposes or for book purposes, or whether this delineation is needed at all. More participants suggested that tax rules should apply, but the delineation remains for consideration by Task Force IV at the Whitefish meeting. Two participants agreed to submit input on understanding the difference between operational leases and financing leases.

2. Definition of “representative”

Issues concerning “representative” were not resolved by Task Force IV. Issues are the definition, impact, and necessity for marketing enhancement, the treatment of leased employees, the use of independent contractors in contrast with employees, and the treatment of part time and full time individuals.

The participants agreed that the employee – independent contractor relationships is a continuum. However, the meaning of “representative” in this context is uncertain.

The participants discussed the intent and purposes of “market enhancement.” The participants agreed that some relationships, such as contracting with an attorney or CPA, are not marketing enhancement and do not create nexus. This Task Force did not discuss the treatment of “affiliates,” as this topic was to be covered by a different task force. One participant noted the second paragraph of market enhancement activities that the U.S. Supreme Court quoted from the Washington Supreme Court’s decision in Tyler Pipe. Not all these described activities involved contact with customers.

The participants discussed the relevance of choice, if any, in the nexus context. For example, suppose an out of state seller agrees by contract to repair items and provides the customer with a choice of repair places inside and outside the state. These and other issues are to be discussed at the Whitefish meeting.

3. Liability

The participants defined the issue as the effect of terminating the contact that established nexus on continued liability to report. The constitutional rule is probably one of proximate cause. The issue will be discussed further in Whitefish.